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Closure in Damage Class Settlements: *The Godfather Guide to Opt-Out Rights*

Richard A. Nagareda[†]

INTRODUCTION

The right to opt out is a peculiar creation of the modern class action.¹ The right holds a sanctified status as a doctrinal matter but, at the same time, stands curiously at odds with the class action in practical terms. In *Phillips Petroleum Co v Shutts*,² the Supreme Court famously spoke of the right to opt out as having constitutional status.³ As a matter of due process, the *Shutts* Court said, the members of a class seeking relief in the form of damages must be afforded the opportunity to exclude themselves from the class.⁴ Given the prevalence of settlements—rather than full-scale trials—as the ultimate outcome of actions certified to proceed on a class-wide basis,⁵ the right to opt out amounts, in practical terms, to a right to escape the preclusive effect of a

[†] Professor, Vanderbilt University Law School. John Goldberg, Michael Rozen, and Jeffrey Schoenblum provided helpful comments on the matters discussed in this Article. Wendy Ertmer and Stephanie Wolfe provided both substantive comments and research assistance.

¹ The major innovation of Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”) consists of its recognition in 1966 of a new type of class action in which the court must afford would-be class members the opportunity to exclude themselves from the class. The Rule 23(b)(3) class action along these lines differs from its procedural predecessor, whereby persons situated similarly to the named class representatives were not part of the class unless such persons affirmatively intervened in the litigation. The drafters of Rule 23(b)(3) developed the notion of an opt-out class in order to prevent the phenomenon of one-way intervention—persons choosing to intervene in the class action only after its success was assured—prevalent under the predecessor rule. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv L Rev 356, 397–98 (1967).

² 472 US 797 (1985).

³ See *id.* at 811–12 (discussing Fourteenth Amendment).

⁴ *Id.*

⁵ Robert H. Klonoff and Edward H.K. Bilich, *Class Actions and Other Multi-Party Litigation* 362 (West 2000). See also Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 NYU L Rev 74, 143 (1996) (empirical study supporting the prevalence of settlements in actions certified to proceed on a class-wide basis that are not resolved on the basis of dispositive motions).

judgment approving the class settlement⁶ and thereafter, conceivably, to sue the defendant in the ordinary civil justice system.

In the aftermath of *Shutts*, opt-out rights occupy an essential role in any class settlement involving damage claims—at least, outside the unusual scenario of claims against a limited fund, when class membership is mandatory.⁷ Opt-out rights nonetheless are in tension with the objective of any class settlement to achieve closure in the area of litigation in which it operates. This sense of closure, and the predictability that comes with it, are what defendants seek above all else in a class settlement.⁸ It should come as no surprise, then, that a pervasive feature of class settlement design consists of efforts, in one way or another, to minimize the number of opt-outs.⁹

At first glance, opt-out minimization might seem like something directed at would-be class members themselves. They, after all, are the holders of rights to sue the settling defendant. In practical terms, however, efforts to minimize the number of opt-outs speak at least as strongly to the law firms within the plaintiffs' bar plausibly positioned to represent opt-out claimants on an individual basis in exchange for contingency fees. These firms stand as the competitors of class counsel in the market for legal representation of plaintiffs. To achieve closure in a class settlement for damage claims, class counsel and their counterparts on the defense side effectively must deter these competitor firms within the plaintiffs' bar from undertaking or continuing the litigation against the defendant.

This Article advances a descriptive claim that leads, in turn, to a series of normative claims. The descriptive claim is that life in the world of class settlement design has come to imitate art: the techniques that class settlement designers have deployed to deter opt-outs roughly track the techniques used by a celebrated fictional organization to secure peace and predictability in the face of tenacious competition from rivals of the same ilk. Specifically, the devices deployed by class settlement designers in recent

⁶ See FRCP 23(e) (requiring judicial approval of class settlements).

⁷ See FRCP 23(b)(1)(B) (authorizing class action where individual adjudication would substantially impede ability of absent class members to protect their interests). On the requirements for certification of a mandatory, limited fund class under Rule 23(b)(1)(B), see *Ortiz v Fibreboard Corp*, 527 US 815, 838–47 (1999).

⁸ See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 Georgetown L J 371, 420 (2001) (noting that defendants seek class certification to achieve finality).

⁹ See Part II.

years to deter opt-outs parallel three plot developments in Francis Ford Coppola's 1972 film, *The Godfather*.¹⁰

A. "I'm Gonna Make Him an Offer He Can't Refuse."¹¹

This most famous line from *The Godfather* comes in a conversation between Vito Corleone, then-head of the Corleone organized crime family, and his godson, Johnny Fontane, a popular singer seeking the lead role in an upcoming Hollywood film.¹² Johnny explains that the producer of the film, Jack Woltz, has refused him the lead role and that it is now too late for a change in casting.¹³ Vito assures Johnny that he will land him the role, explaining that he will make Woltz "an offer he can't refuse."¹⁴ The "offer," of course, ultimately consists of the implicit threat to Woltz's life conveyed by his receipt, in his bed, of the severed head of his valuable stud horse, an offer made after Woltz bluntly refuses the attempt of a Corleone family member to intercede on Johnny Fontane's behalf.¹⁵

The double-edged meaning of "an offer he can't refuse" stands as an apt description of an issue at the forefront of class settlement design. As to any given class member, a good opt-out class settlement under Rule 23(b)(3) of the Federal Rules of Civil Procedure or a state law equivalent¹⁶ literally *should* be an offer that cannot be refused. It should offer class members an alternative bundle of rights that makes conventional civil litigation unattractive by comparison. In so doing, the class settlement should leave

¹⁰ Paramount 1972.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ *The Godfather*, Paramount 1972.

¹⁵ Id. Vito's remark about his plan for dealing with Woltz recalls another conversation in the film in which the young Michael Corleone uses a similar phrase to describe an incident some years earlier. At that time, Vito and his enforcer, Luca Brasi, induced a reluctant bandleader to sign a contract to release Johnny Fontane from a personal service obligation in exchange for only modest consideration. In Michael's words: "Luca Brasi held a gun to [the bandleader's] head, and my father assured him that either his brains or his signature would be on the contract." Id.

Later in the film, Michael reuses the phrase to explain how he—now leader of the Corleone family—plans to convince Moe Greene to sell his Las Vegas casino and, in so doing, to enable the Corleones to move their operations to Nevada. Greene refuses and is subsequently murdered on Michael's orders—a plot development that, as I shall explain in Part III, gives rise to yet another analogue in the world of class settlements.

¹⁶ Many state class action rules track Rule 23. For a comprehensive guide to state class action rules, see Linda S. Mullenix, *State Class Actions: Practice and Procedure* (CCH 2000).

rival plaintiffs' law firms with little to gain from a campaign to represent opt-outs. But an opt-out class settlement might try to make an offer that class members cannot refuse in the more sinister sense used in *The Godfather*: an offer that is no offer at all in practical terms but, rather, simply an illegitimate threat to leave class members with nothing in the event that they refuse the offer.

A proper conception of the class action should enable the law to distinguish between these two sorts of offers. I set forth such a conception here, focusing closely on recent efforts to design a class settlement in the Sulzer hip implant litigation.¹⁷ Class settlement designers there sought to leave open an opportunity to opt out in theory but to deter its pursuit in practice—specifically, to use a wily combination of a security interest and a trust fund to leave practically nothing from which opt-out claimants might recover.¹⁸ The enterprise of opt-out deterrence, in fact, has deep roots in the annals of class settlements, tracing its lineage at least to events surrounding the opt-out class settlement for the Agent Orange litigation in the early 1980s.¹⁹ Indeed, outside of the class action realm, one can see a similar phenomenon at work in the legislation enacted by Congress for compensation of victims of the September 11, 2001, terrorist attacks (the “9/11 Fund” legislation).²⁰

Systematic comparison of these various efforts to deter opt-outs illuminates the nature of the class action. As I discuss in greater depth in a companion article elsewhere,²¹ the law of class actions, properly conceived, permits a broad range of class settlement provisions to deter opt-outs. What an opt-out class settlement may not do, however, is what Congress permissibly did in the 9/11 Fund legislation: deter opt-outs by *both* providing class members with an attractive alternative to conventional civil litigation *and* altering detrimentally their preexisting legal rights in the event that they forego that alternative and sue instead. My first normative claim, in short, is that an opt-out class settle-

¹⁷ *In re Inter-Op Hip Prosthesis Liability Litigation*, 204 FRD 330 (N D Ohio 2001).

¹⁸ *Id.* at 351–52.

¹⁹ See Peter H. Schuck, *Agent Orange on Trial* (Belknap Press enlarged ed 1987) (detailing the story of the Agent Orange litigation).

²⁰ Air Transportation Safety and System Stabilization Act, Public L No 107-42, 115 Stat 230 (2001), codified at 49 USC § 40101 (2001).

²¹ Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum L Rev 149 (2003).

ment, unlike public legislation, enjoys no general mandate to alter unilaterally the legal rights of would-be class members.

B. “Whoever Comes to You With This Barzini Meeting—He’s the Traitor. Don’t Forget That.”²²

Later in *The Godfather*, the aging Vito Corleone issues this warning to his son Michael, concerning an expected effort by the rival Barzini family to invite Michael to a meeting—ostensibly for the purpose of peacefully settling the two families’ differences.²³ Vito urges Michael to distrust this invitation, even though Vito expects it to come through a trusted subordinate within the Corleone criminal organization—from a “traitor” who actually is working with the Barzini family to set up Michael to be murdered at the meeting.²⁴ Michael subsequently heeds Vito’s advice, foregoing the meeting and ordering the death of the subordinate (Tessio) who comes to him with the Barzini invitation.²⁵

This idea of recruiting a trusted insider to persuade his cohorts to support a deal that ultimately will benefit others has not been lost upon class settlement designers. One of the techniques that defendants use to elicit support for class settlements from the plaintiffs’ bar as a whole involves the retention of prominent plaintiffs’ lawyers as class settlement negotiators for the defense.²⁶ To be sure, the recruitment of a prominent plaintiffs’ lawyer as the dealmaker for the settling defendant takes place overtly, whereas the Barzinis sought (unsuccessfully) to keep secret their recruitment of Tessio to betray the Corleones. The ultimate goal nonetheless remains for the recruited insider to persuade his supposed friends to embrace a deal—in the class settlement context, to persuade rival plaintiffs’ law firms not to undertake the representation of opt-out claimants such as would undermine the closure that a class settlement otherwise would bring.

Interestingly enough, in both *The Godfather* and the world of class settlements, the recruit-an-insider technique usually does not work. The most prominent example of this technique in action—a defendant’s effort to use longtime plaintiffs’ lawyer Rich-

²² *The Godfather* (Paramount 1972).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Mark Curriden, *Switch-hitters Saving the Day*, 87 ABA J 18, 18 (Nov 2001) (discussing the rise of this technique in civil settlements generally).

ard “Dickie” Scruggs as its class settlement negotiator—met with the same suspicion from his cohorts within the plaintiffs’ bar as did the Barzini invitation to Michael Corleone.²⁷

C. “Today, I Settle All Family Business.”²⁸

Michael delivers this line near the end of *The Godfather* as a euphemistic summary of the actions undertaken on his orders to “settle” the Corleones’ ongoing disputes, not only with the Barzini family but with all of the “five families” jockeying for control of organized crime activities in the New York area: namely, the systematic murder on a single day of the leaders of all rival families.²⁹ The less lethal class action analogue would consist of importing into the world of class settlements a feature increasingly found in settlements of non-class litigation: contractual agreements by plaintiffs’ lawyers not to represent additional clients in similar lawsuits.³⁰

In the class settlement context, the trick lies in obtaining such agreements from the firms within the plaintiffs’ bar, *other than* those class counsel, positioned to induce class members to opt out and to represent them in individual damage actions. Class settlement designers might try to achieve closure, in other words, by effectively eliminating potential rivals for the representation of individuals within the class, albeit by paying those potential rivals rather than by shooting them. A realistic conception of class settlements—as measures that speak as much to rivalries within the plaintiffs’ bar as to disputes between the plaintiff class and the settling defendant—should condemn such agreements.

My account of how class settlement design has come to replicate unwittingly the plot of *The Godfather* and what the law should do about it proceeds, appropriately enough, in three parts. Part I sets the scene, discussing the strategic and doctrinal considerations that underlie efforts to deter the exercise of the right to opt out. Part II compares the three examples mentioned earlier—the Sulzer hip implant class settlement, the Agent Orange

²⁷ See Part II C.

²⁸ *The Godfather* (Paramount 1972).

²⁹ *Id.*

³⁰ See Milo Geyelin, *Some Companies Pay Lawyers Not to Sue Again*, Wall St J B1 (May 16, 2001) (reporting the rise of such agreements in settlements of non-class lawsuits). In this regard, I simply make a descriptive observation of developments in settlement practice, leaving for others the significant question of whether such agreements are permissible as an ethical matter. See note 129.

class settlement, and the 9/11 Fund legislation—in an effort to discern a principled line between permissible and impermissible deterrent devices for opt-outs. Part III analyzes the emergence of devices to deter opt-outs by paying off the plaintiffs' law firms best positioned to represent them, discussing the antitrust implications of such a strategy.

I. THE STRATEGY AND DOCTRINE OF OPT-OUT DETERRENCE

Strategy and doctrine converge to provide the designers of opt-out class settlements with powerful incentives to embrace settlement provisions to deter the exercise of the right to opt out. Identification of these incentives starts with a recognition that the overwhelming majority of class actions—that is, actions certified to proceed in the class format—result in settlements rather than judgments after full-scale trials.³¹ As a practical matter, class actions serve as the vehicles for “transactions” in which class members' rights to sue are “bought and sold”³² in exchange for an alternative bundle of legal rights described in the class settlement agreement.³³

A. The Strategic Reasons to Deter Opt-Outs

Relief in the form of damages characterizes many areas of substantive law in which class actions operate, ranging across tort, securities, antitrust, and consumer protection law, among other examples. Absent the existence of a limited fund such as will warrant the certification of a mandatory class under Rule 23(b)(1)(B), a class action for damages may proceed, if at all, only on a non-mandatory, opt-out basis.³⁴ The structural distinction in Rule 23 between mandatory and opt-out classes, however, exists in tension with the strategic incentives of both defendants and class counsel with respect to class settlements.³⁵ To put the point

³¹ See note 5.

³² Rubenstein, 89 *Georgetown L J* at 419 (cited in note 8).

³³ *Id.*

³⁴ Absent the ability to satisfy the demands for a mandatory, limited fund class under Rule 23(b)(1)(B), the only realistic alternative for a class action seeking damages is Rule 23(b)(3), which authorizes class certification on a nonmandatory, opt-out basis. See FRCP 23(b). Other portions of subsection (b) provide for the certification of mandatory class actions in certain situations aside from those in which the relief sought consists predominantly of damages. See *id.*

³⁵ See George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 *NYU L Rev* 258, 279–80 (1996) (explaining that, because

bluntly, both sides at the class settlement negotiation table have reasons to design an ostensible opt-out class settlement to approach a mandatory class settlement in operation. The way to achieve that goal is to deter the exercise of the right to opt out.

For defendants, the benefit from a class settlement involving damage claims lies in the degree to which it will mark the achievement of a lasting peace in the underlying area of litigation.³⁶ Here, peace has a very specific meaning, consisting of the absence of further lawsuits as a result of the preclusive effect that flows from the judgment approving the class settlement agreement under Rule 23(e).³⁷ That judgment and the preclusive effect that comes with it are what a settling defendant seeks to purchase through the transaction that is the class settlement.³⁸

Any settlement in civil litigation holds the prospect of gains for both sides by substituting the predictability of the settlement agreement for the unpredictability that continued litigation would entail. Exercise of the right to opt out undercuts—potentially, quite dramatically—the peace that a class settlement will bring.³⁹ As existing commentary recognizes, moreover, opt-outs are highly unlikely to be distributed evenly throughout a class of damage claimants.⁴⁰ Rather, because the right to opt out is an individual right to be exercised on a class-member-by-class-member basis,⁴¹ there is every reason to believe that opt-outs will consist disproportionately of persons likely to have the most marketable damage claims on an individual basis. And, given the pervasive use of contingency fee arrangements as the funding

of class members' interests in maintaining control of the claim and the defendant's interest in attaining finality, both have an interest in minimizing the number of opt-outs).

³⁶ See Rubenstein, 89 Georgetown L J at 419 (cited in note 8) (explaining that defendants settle in exchange for finality).

³⁷ See *id.* (noting that defendants settle to avoid the filing and trial of underlying claims in a complex class action).

³⁸ See *id.*

³⁹ See Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L J 85, 143–44 (1997) (“[R]ecognition of opt-out rights in cases in which they are feasibly employed can destroy the effectiveness of the class action mechanism.”).

⁴⁰ See *id.* at 89; Rutherglen, 71 NYU L Rev at 278–79 (cited in note 35).

⁴¹ Courts have turned away efforts to opt out the members of nationwide damage classes on a mass basis through the pursuit of rival class actions in state court confined to the members of the nationwide class who reside in the forum state. See, for example, *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 282 F3d 220, 225 (3d Cir 2002); *Hanlon v Chrysler Corp.*, 150 F3d 1011, 1024 (9th Cir 1998).

mechanism on the plaintiffs' side of civil litigation for damages,⁴² the most marketable damage claims are those that promise the highest damage recoveries and, hence, the highest fees for the attorneys who represent those claimants.

That high-value damage claims might leave the class, perhaps in droves, is a troubling prospect for the settling defendant.⁴³ Without the ability to bind all would-be damage claimants to the judgment in the class action, the defendant will have to resolve opt-out cases in the ordinary civil litigation process. That process and the uncertainty that accompanies it, however, are what the settling defendant seeks to avoid by embracing a class settlement in the first place.⁴⁴ The incentive to settle will be especially strong when the underlying damage claims include components that are prone to variance, such as damages for pain and suffering⁴⁵ and/or punitive damages based upon the perceived extremity of the defendant's misconduct.⁴⁶ In fact, empirical researchers have documented that, "[o]n average, press announcements of punitive damage lawsuits impose larger market value losses on the defendant firms than the total compensatory and punitive damages eventually awarded."⁴⁷ The prospect of variance in damage litigation imposes costs on defendants above and beyond the costs of the damages ultimately paid and, as such, presents an inviting prospect for gain through the reduction of that potential variance by way of a settlement.

The upshot is that defendants have every reason to seek as comprehensive of a class settlement as they can get, either through the operation of Rule 23 in the special case of a limited fund or through the design of an opt-out settlement to deter class members from actually leaving the class. This tendency is not an inevitably bad thing for class members. One way to deter class

⁴² See Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L Rev 267, 267 (1998).

⁴³ See Perino, 46 Emory L J at 131–32 (cited in note 39) (discussing bargaining power of credible opt-out threats).

⁴⁴ Rubenstein, 89 Georgetown L J at 419 (cited in note 8).

⁴⁵ See, for example, Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 Cal L Rev 773, 777 (1995) ("[J]ury awards for pain and suffering vary widely for injuries that appear to be equally severe.").

⁴⁶ See, for example, Daniel Kahneman, David A. Schkade, and Cass R. Sunstein, *Shared Outrage, Erratic Awards*, in Cass Sunstein, et al, eds, *Punitive Damages: How Juries Decide* 31 (Chicago 2002) (exploring potential sources of the unpredictability in awards of punitive damages).

⁴⁷ Jonathan M. Karpoff and John R. Lott, Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 J L & Econ 527, 571 (1999).

members from opting out is by presenting them with the prospect of resolving their claims through a framework likely to prove more efficient at the transfer of money from the defendant to injured claimants than the ordinary civil litigation process. A class settlement along these lines would indeed form an offer that class members could not refuse, but it would do so in the non-sinister sense of that phrase. Class settlements that truly are too good to be refused, however, also are likely to cost money for the settling defendant. The problem lies in the possibility that the defendant might seek to deter opt outs illegitimately, not through the provision of generous benefits under the class settlement but through the less costly vehicle of settlement structure.⁴⁸

In this enterprise, the settling defendant is likely to find an eager partner in class counsel as the self-appointed agent for the class. Class counsel stand to gain financially from the bringing of the class action only by precipitating a settlement from the defendant or through the more risky, costly, and rare path of a full-scale, class-wide trial.⁴⁹ Moreover, as an ethical matter, class counsel who seek to defend a class settlement as a fair deal for the members of the class have no prospect of representing persons who opt out, for they, by definition, have rejected the deal negotiated by class counsel.

These two features of the legal landscape—a payoff tied to the achievement of a settlement and an inability to gain from the litigation of opt-out cases—together create an incentive for class counsel to give heed to the defendant's desire for measures to deter the exercise of the right to opt out. In order to gain the fees from a class settlement, class counsel must get the defendant to agree to a deal, and the defendant, for the reasons outlined above, will have reason to make its assent dependent upon the inclusion of measures to deter opt-outs.

B. The Unwitting Effect of Supreme Court Decisions

Class action doctrine accentuates, albeit inadvertently, the pull of strategic considerations. The unintended effect of the landmark Supreme Court decisions from the 1990s on damage class settlements—*Amchem Products, Inc v Windsor*⁵⁰ and *Ortiz v*

⁴⁸ See, for example, the Sulzer settlement discussed in Part II C.

⁴⁹ See Kritzer, 47 DePaul L Rev at 270–71 (cited in note 42) (discussing the attorney's assumed risks and the plaintiff's benefits from a contingency fee arrangement).

⁵⁰ 521 US 591 (1997).

*Fibreboard Corp*⁵¹—is to give negotiators all the more reason to craft deals that look like opt-out class settlements but that function as mandatory ones in practical effect. In *Amchem*, the Court decertified an opt-out class action under Rule 23(b)(3) brought simply to serve as the enforcement device for the settlement of damage claims by workers exposed to the asbestos-containing products of some twenty companies.⁵² The *Amchem* Court noted that the demands of Rule 23 for a high degree of cohesiveness within the class and for adequate class representation bear “heightened” attention in the settlement context, because a class settlement operates to dispose of absent class members’ rights to sue.⁵³

In *Ortiz*, the Court decertified a mandatory class action under Rule 23(b)(1)(B) brought as the means to resolve the damage claims of workers exposed to the asbestos-containing products of Fibreboard Corporation.⁵⁴ The *Ortiz* transaction enabled Fibreboard, first, to resolve a long-running dispute with its insurers over the extent of their coverage for the company’s asbestos liabilities and, then, to designate the funds from that insurance coverage settlement as the sole source of recovery for workers with tort claims against Fibreboard in the future.⁵⁵ As the *Ortiz* Court repeatedly noted, the net worth of Fibreboard above and beyond its insurance coverage—what damage claimants clearly could have attempted to tap in ordinary tort litigation—would have remained largely untouched.⁵⁶

The *Ortiz* Court underscored the stringent demands that Rule 23(b)(1)(B) places upon those who would mandate membership in a class based upon the existence of a limited fund to satisfy extant damage claims.⁵⁷ Drawing heavily on early equity cases,⁵⁸ the Court emphasized that a mandatory class under Rule 23(b)(1)(B) turns upon proof of a true limited fund—a fund set definitely at its maximum,⁵⁹ rather than one, like that in *Ortiz*, whose purported limit consisted of nothing more than the say-so

⁵¹ 527 US 815 (1999).

⁵² 521 US at 597.

⁵³ *Id.* at 620.

⁵⁴ 527 US at 821–22, 829–830.

⁵⁵ *Id.* at 822–25.

⁵⁶ *Id.* at 859–60.

⁵⁷ *Ortiz*, 527 US at 838–48.

⁵⁸ *Id.* at 834–37.

⁵⁹ *Id.* at 838.

of the settling parties.⁶⁰ In addition, the Court drew from the equity precedents the further limitation that the limited fund must be distributed entirely to the members of the mandatory class.⁶¹

The structure of the transaction struck down in *Ortiz*—an attempt to use a mandatory class settlement to cap liability at insurance limits—is a matter to which I shall return in connection with the 9/11 Fund legislation. For now, the point is that *Ortiz* posits heightened procedural demands for the certification of a mandatory class.⁶² That is hardly surprising, given that a mandatory class, by definition, dispenses with the check upon the dealmakers that the right to opt out otherwise would bring. For the designers of class settlements, the holdings in *Amchem* and *Ortiz* virtually invite efforts to gain the certainty of a mandatory class while satisfying only the comparatively less demanding procedural hurdles that apply to an opt-out class. The challenge, in sum, lies in deterring the exercise of the right to opt out.

An additional dimension of *Amchem* and *Ortiz* bears mention here. The Supreme Court's decisions in both cases came at the behest of class settlement objectors consisting of law firms within the asbestos plaintiffs' bar other than class counsel.⁶³ The opt-out class settlement in *Amchem* and the mandatory class settlement in *Ortiz* threatened the business prospects of these competing firms within the asbestos plaintiffs' bar—hence, their willingness to spearhead the procedural challenges to the class settlements all the way to the nation's highest court. The nature of that threat is sometimes mischaracterized in the academic literature, which has tended to focus on side payments made by the settling defendants to class counsel to resolve the latter's pending asbestos cases⁶⁴—claims not within the class definition in either case. The story often told in the academic literature is of class counsel receiving a lucrative payoff for their pending asbestos cases in exchange for their willingness to sign on to an inadequate class settlement that would bind future claimants.⁶⁵ The problem with

⁶⁰ Id at 848.

⁶¹ *Ortiz*, 527 US at 839.

⁶² Id at 838–47.

⁶³ See Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich L Rev 899, 962–63 (1996) (discussing the leading role played by the Dallas law firm of Baron & Budd in the successful campaign to derail the *Amchem* class settlement).

⁶⁴ See, for example, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum L Rev 1343, 1394 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L Rev 1045, 1064–65 (1995).

⁶⁵ See, for example, Coffee, 95 Colum L Rev at 1394 (cited in note 64); Koniak, 80 Cornell L Rev at 1064–65 (cited in note 64).

this story is that defendants did not offer such side payments uniquely to class counsel in *Amchem* or *Ortiz* but, rather, offered similar terms for the resolution of pending cases filed by other asbestos plaintiffs' law firms as well.⁶⁶

A threat to competing asbestos plaintiffs' law firms was indeed present in *Amchem* and *Ortiz*, but it was of a more subtle variety than the one often described: the threat was that class counsel would receive a substantial *and immediate* payoff—the side payments for their pending cases, plus a fee award from their representation of the respective classes—and then would deploy those funds in new areas of civil litigation involving matters *other than* asbestos.⁶⁷ The threat, in short, was to leave the asbestos area to the competitors of class counsel under less attractive terms than had previously prevailed in the litigation and, at the same time, to gain a competitive advantage in capitalization for purposes of new, lucrative areas of litigation.

The larger implication from the schisms within the plaintiffs' bar that precipitated the decisions in *Amchem* and *Ortiz* is this: class settlement designers have reason to find ways to prevent competing plaintiffs' law firms from undercutting their deal, whether by engaging in a campaign to induce opt-outs or by derailing the approval of the class settlement in the manner of the successful objectors who took their concerns all the way to the Supreme Court. An important dimension of a class settlement, in short, consists of the rivalries among persons whom one initially might think to be in the same camp—rivalries not unlike those among the various organized crime families in *The Godfather*, all nominally aligned on the same side of the law.

II. CLOSURE THROUGH OPT-OUT DETERRENCE

To discern a principled line between permissible and impermissible deterrent devices for opt-out class settlements, this Part draws upon three real-world examples: the 9/11 Fund legislation enacted by Congress in the fall of 2001; the Agent Orange class settlement from the mid-1980s; and efforts in recent years to design a class settlement in the Sulzer hip implant litigation. These are by no means the only examples that one might use to explore

⁶⁶ See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv L Rev 747, 777 n 122 (2002).

⁶⁷ For development of this point, see Nagareda, 94 Mich L Rev at 936–37 (cited in note 63).

the deterrence of the right to opt out. They nonetheless suffice to enable one to draw some revealing inferences, not just about similarities to events in *The Godfather* but, more importantly, about which kinds of deterrent devices the law should permit and which it should not.

Opt-Out Deterrence in Class Settlements and Legislation

	9/11 Fund Legislation	Sulzer Hip Implant Class Settlement (original version)	Agent Orange Class Settlement
Opt-Out Deterrent	Cap on airline liability at insurance limits (permissible in legislation but generally <i>not</i> in a class settlement, per <i>Ortiz</i>)	Prospect of obtaining no recovery due to lien on Sulzer's assets in favor of trust created by the settlement to fund compensation for the class	Prospect of obtaining no recovery due to inability to prove causation
Benefits for Remaining in the Class	Administrative compensation at amounts set by Special Master, with payouts backed by U.S. Treasury	Administrative compensation at amounts described in settlement	Administrative compensation pursuant to settlement

The 9/11 Fund legislation and the Agent Orange litigation provide the most straightforward starting point for analysis.

A. The 9/11 Fund Legislation

The 9/11 Fund legislation arose from expectations of an influx of conventional tort suits by the victims of the September 11, 2001, terrorist attacks or their survivors against the airlines that operated the fatal flights.⁶⁸ Although Congress arguably might

⁶⁸ See Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 Va L Rev 1831, 1835 (2002).

have chosen to preempt completely state tort law with regard to such suits against the airlines, Congress chose a less drastic policy course. Congress left open the avenue of conventional tort suits, but Congress made such litigation less attractive to victims *and* created a streamlined alternative regime for compensation. Specifically, victims still may sue the airlines, but the 9/11 Fund legislation caps airline liability in conventional civil litigation at the limits of airline insurance coverage and restricts victims' choice of forum to a single federal district court.⁶⁹ As an alternative to litigation under those limitations, the legislation enables victims to opt instead for compensation under a federal administrative regime backed by the credit of the United States Treasury.⁷⁰

Whether the 9/11 Fund legislation represents enlightened public policy is a question that scholars surely will debate for years to come. My point here goes not to policy efficacy but to legal authority. Duly exercising its legislative power under Article I of the Constitution,⁷¹ Congress clearly had the authority to enact the 9/11 Fund legislation. Pursuant to the Commerce Clause,⁷² Congress may both create a federal administrative regime for compensation and discourage the pursuit of conventional tort litigation by altering victims' preexisting rights to sue. The cap on liability at the limits of insurance coverage imposed by the 9/11 Fund legislation is the analogue in the legislative sphere to the cap that the *Ortiz* Court held could not be imposed by a class settlement absent the existence of a true limited fund.⁷³ In terms of its effect upon conventional litigation, a class settlement cannot do everything that Congress itself might do through duly enacted legislation.

All of this is not to say, however, that the prospects for individual lawsuits by the would-be members of a class must remain rosy in the face of a class settlement. To the contrary, the process for judicial approval of a class settlement under Rule 23(e) often will bring to light information that sheds some—perhaps, considerable—doubt upon the viability of conventional lawsuits.⁷⁴ Specifically, in the course of determining whether a class settlement

⁶⁹ Air Transportation Safety and System Stabilization Act, § 408(a) & (b)(3), 115 Stat at 240–41.

⁷⁰ *Id.* at § 405, 115 Stat at 238–40.

⁷¹ US Const Art I, § 1.

⁷² *Id.* at § 8, cl 3.

⁷³ See Part I.

⁷⁴ See, for example, Agent Orange settlement discussed in Part B.

is “fair, reasonable, and adequate” for purposes of Rule 23(e),⁷⁵ the reviewing court inevitably will reflect upon the viability of class members’ claims in conventional litigation.⁷⁶ One can ascertain whether a class settlement is a “fair, reasonable, and adequate” deal, after all, only by thinking about what class members must relinquish in exchange. The next section addresses a class settlement scenario of this sort.

B. The Agent Orange Class Settlement

The Agent Orange litigation presents a vivid—and, for devotees of class actions, relatively familiar—example of a class action precipitating judicial reflection upon the dubiousness of the plaintiffs’ claims on the merits. The litigation culminated in an opt-out class settlement under Rule 23(b)(3) that created a fund for compensation of military personnel exposed to the defoliant Agent Orange during their service in the Vietnam War.⁷⁷ Speaking with class counsel during settlement negotiations on the eve of trial, Judge Jack Weinstein underscored his formidable doubts about the causation element of plaintiffs’ case.⁷⁸ Later, as part of his decision to approve the class settlement under Rule 23(e), Judge Weinstein pointedly noted that the available evidence on the existence of a causal link between Agent Orange and the maladies suffered by the plaintiff class would not have been sufficient to support tort recovery.⁷⁹ The Agent Orange class settlement was a good deal, in short, because class members were quite likely to end up completely empty-handed in conventional tort litigation. Indeed, in the few instances of opt-outs from the class settlement, Judge Weinstein, true to his word, ultimately granted summary judgment for the defendants based upon the absence of a triable issue on the causation element.⁸⁰

⁷⁵ Though not currently part of Rule 23(e) by its terms, the mantra “fair, reasonable, and adequate” is the standard applied by courts in determining whether to approve a class settlement under that rule. See *Manual for Complex Litigation (Third)* § 30.42 at 238 (Fed Judicial Center 1995).

⁷⁶ See Part B.

⁷⁷ *In re “Agent Orange” Product Liability Litigation*, 597 F Supp 740, 747 (E D NY 1984).

⁷⁸ See Schuck, *Agent Orange on Trial* at 160–61 (quoting sworn statement of class counsel) (cited in note 19).

⁷⁹ *In re “Agent Orange” Product Liability Litigation*, 597 F Supp at 795.

⁸⁰ *In re “Agent Orange” Product Liability Litigation*, 611 F Supp 1223, 1264 (E D NY 1985).

Revelations that class members might well encounter barriers to successful conventional suits undoubtedly deter the exercise of the right to opt out in a sense. But it is equally clear that this sort of deterrence—if one can call it that at all—must be permissible in order for opt-out class settlements ever to be viable. In the Agent Orange litigation, the class settlement itself effected no alteration whatsoever of class members' legal rights. The settlement did not cap the defendants' liability, for example, but merely precipitated a line of inquiry that highlighted a preexisting barrier to successful tort suits. The proceedings on the class settlement exposed the dearth of evidence on the causation element of the plaintiffs' case; but the settlement itself did not create that deficiency. Under these circumstances, the class settlement was genuinely an offer too good for class members to refuse.⁸¹

C. The Sulzer Hip Implant Class Settlement

Bearing in mind the two straightforward examples of the 9/11 legislation and the Agent Orange class settlement, one may turn to a harder case from recent times. The Sulzer hip implant litigation arose from the discovery of a manufacturing defect in one component within a larger medical device designed to replace the hip joint.⁸² The defendant manufacturer recalled the defective units but not until after thousands of them already had been implanted in patients across the country.⁸³ Some patients stood to recover large damage awards, having already undergone "revision" surgery to correct the problems caused by the manufacturing defect or needing such surgery in the future.⁸⁴ The substantial majority of implant recipients, however, had only modest damage claims, at best, having experienced no problems with their hip implants and needing only minimal medical screening to confirm that revision surgery would be unnecessary.⁸⁵

The challenge for class counsel and Sulzer lay in the design of an opt-out class settlement that would deter the high-value damage claimants from leaving the class. Sulzer pursued this objective not only in the terms of the class settlement itself—

⁸¹ If anything, one might question Judge Weinstein's tenaciousness in encouraging the defendants to settle in the face of the formidable doubts about causation.

⁸² *Inter-Op Hip Prosthesis Liability Litigation*, 204 FRD 330, 335 (N D Ohio 2001).

⁸³ *Id.*

⁸⁴ *Id.* at 335–36.

⁸⁵ *Id.* at 348.

about which I will have more to say—but also in its choice of bargaining agent. Sulzer retained as its class settlement negotiator Dickie Scruggs, a nationally renowned plaintiffs' lawyer from Mississippi who previously had taken a leading role in the legal assault against the tobacco industry, among other targets of mass tort litigation.⁸⁶ Sulzer's objective in retaining Scruggs reportedly was to use his stature in the eyes of his fellow plaintiffs' lawyers as a selling point for a class settlement that would bring closure to the hip implant litigation.⁸⁷

In this regard, Sulzer's approach borrowed, apparently unconsciously, from the Barzini family's recruitment of a subordinate within the Corleone family. The idea was to recruit an insider within the plaintiffs' bar to convince his cohorts to support the hip implant class settlement by foregoing an opt-out campaign. For Scruggs himself, the prospect of switching to the defense side for purposes of the hip implant litigation was very much a "business," not a "personal," matter.⁸⁸ Scruggs reportedly stood to be paid "a 'low seven-figure number,' plus a 'success fee' of about \$20 million should the settlement be approved."⁸⁹

Sulzer had good reason to try to ingratiate itself with the plaintiffs' bar, even at the cost of paying twenty million dollars to Scruggs. That reason stemmed from the deal that Sulzer sought to strike in a class settlement designed to deter the would-be members of the class—especially, the high-value claimants in need of revision surgery—from opting out. The class settlement would have established a trust to fund compensation payments to class members.⁹⁰ This trust fund would have consisted, in essence, of the cash that Sulzer could assemble while still maintaining itself as a going concern.⁹¹ Specifically, Sulzer would have committed to the trust fund its insurance proceeds, its available cash (but for one month of working capital), a specified number of shares, plus one-half of its net annual income until the payment

⁸⁶ Curriden, 87 ABA J at 18 (cited in note 26).

⁸⁷ Id.

⁸⁸ Before being led to his death on the orders of Michael Corleone, the traitor Tessio utters his famous last words: "Tell Mike it was only business. I always liked him." These words recall earlier scenes in *The Godfather* in which members of the Corleone family distinguish sharply between desirable actions that advance the "business" interests of the family and undesirable actions that serve mere "personal" vendettas. *The Godfather* (Paramount 1972).

⁸⁹ Jess Bravin, *Sulzer Medica Reaches Novel Class-Action Pact*, Wall St J A3 (Aug 16, 2001).

⁹⁰ *Inter-Op Hip Prosthesis*, 204 FRD at 351.

⁹¹ Id.

of all benefits promised in the class settlement.⁹² Though sizeable, the trust fund nonetheless left the other assets of Sulzer essentially undisturbed—a far-from-incidental consequence, the significance of which will emerge momentarily.

In addition, the class settlement would have placed a lien on all of Sulzer's assets in favor of the trust fund for the class.⁹³ In practical terms, the effect of the lien would have been to delay the payment of any settlement or damage award in favor of any opt-out claimant for a period of roughly six years—the time expected for the completion of payouts to class members by the trust.⁹⁴ When describing this deal to the *Wall Street Journal*, Scruggs painted an even darker picture for opt-out claimants: “[I]f anybody opts out, they still have to try their case, win their case, win their appeal, and then there would be no assets to satisfy their judgment, because they are all pledged to the class.”⁹⁵

In fact, the prioritizing of class members over opt-out claimants was the *sole* purpose of the lien. In a revealing loophole, the class settlement agreement provided that Sulzer could sell its assets for other “business purposes” free and clear of the lien, as long as the proceeds from any such sales were not used to pay opt-out claimants.⁹⁶

But just as the Corleones sniffed out the real agenda behind the rival Barzini family's invitation, so too did rival firms within the plaintiffs' bar successfully object to the original Sulzer class settlement. The objectors were led by a prominent plaintiffs' law firm that earlier sought unsuccessfully to assume leadership of the hip implant litigation nationwide.⁹⁷ The objectors' motives went beyond a mere “personal” vendetta against class counsel; rather, their motives were eminently “business”-related.

The objectors had already obtained as their clients in conventional tort litigation a significant proportion of the high-value

⁹² *Id.*

⁹³ *Id.* at 352.

⁹⁴ *Inter-Op Hip Prosthesis*, 204 FRD at 352 n 23.

⁹⁵ Bravin, *Sulzer Medica*, Wall St J at A3 (cited in note 89) (quoting Scruggs).

⁹⁶ Class Action Settlement Agreement Among Sulzer Orthopedics and Affiliated Entities Including Sulzer Medica Ltd. and Class Counsel on Behalf of Class Representatives § 2.9(f) (Aug 23, 2001), *Inter-Op Hip Prosthesis*, 204 FRD at 530 [on file with U Chi Legal F].

⁹⁷ See *Inter-Op Hip Prosthesis*, 204 FRD at 336 n 5 (“Interestingly, Richard Heimann is one of the attorneys who filed a motion for consolidation . . . [and] is now one of the most vocal objectors.”).

revision surgery claimants.⁹⁸ For the objectors, the prospect of simply opting these clients out of the class settlement would have been to little avail, for they then would have been subject to the lien in favor of the class consciously designed, in Scruggs's words, to leave opt-outs with "no assets to satisfy [a] judgment."⁹⁹ The class settlement thus portended for the objecting firms and their high-value claimant clients something roughly analogous to what the Barzini meeting invitation portended for Michael Corleone: death, if not literally, then figuratively in terms of the objecting law firms' ability to profit from their previous efforts to identify and recruit the most promising claims in the hip implant litigation.

The objectors initially lost in federal district court, which approved the class settlement as fair under Rule 23(e),¹⁰⁰ but the objectors then appealed to the Sixth Circuit. In ruling upon a preliminary motion in connection with the appeal, the Sixth Circuit intimated that it had "serious doubts as to the legitimacy of the class settlement."¹⁰¹ Before the appellate court could rule on the merits, however, class counsel and their defense counterparts returned to the negotiating table and crafted a new class settlement agreement that notably eliminated both the trust fund and the lien feature in the original deal.¹⁰² The class settlement in its original form nonetheless serves as a useful pedagogical tool with which to identify the kinds of opt-out deterrents the law should permit and those that it should not. After identifying these deterrents, I shall speak briefly of how the changes made to the Sulzer class settlement terms shed light on the right to opt out.

At first glance, the lien feature of the original Sulzer hip implant settlement might appear similar to the Agent Orange settlement in the sense of positing an alternative so attractive as to induce class members to forego conventional lawsuits. The lien certainly would have enhanced the assurance to class members that the assets of Sulzer would not be dissipated over time

⁹⁸ See Petitioners' Consolidated Brief in Support of Appeal Pursuant to FRCP 23(f) and FRAP 5, at 3-4, *In re Inter-Op Hip Prosthesis Product Liability Litigation*, Nos 01-303 and 01-304 (6th Cir 2001) [on file with the U Chi Legal F].

⁹⁹ Bravin, *Sulzer Medica*, Wall St J at A3 (cited in note 89).

¹⁰⁰ *Inter-Op Hip Prosthesis*, 204 FRD at 335.

¹⁰¹ *In re Inter-Op Hip Prosthesis Product Liability Litigation*, 2001 US App LEXIS 25910, *5 (6th Cir 2001).

¹⁰² Class Action Settlement Agreement Among Sulzer Orthopedics Inc, Sulzer Medica AG, Sulzer AG, and Class Counsel on Behalf of Class Representatives (Mar 13, 2002), available online at <<http://www.sulzerimplantsettlement.com/classactionsettlement.htm>> (visited Mar 22, 2003).

through conventional lawsuits brought by opt-out claimants. But the boosting of benefits to class members in this manner was not the sole effect of the class settlement. Rather, that boost would have come only as part and parcel of an alteration of hip implant patients' rights, even those of patients who chose to stand outside of the class.

Absent the class settlement, damage claimants against Sulzer stood vis-à-vis one another in a race to recover against the assets of the corporation. By invoking the image of a "race," I mean quite literally that, without the class settlement, any given damage claimant stood at risk that another claimant might leapfrog ahead of her to obtain actual payment from Sulzer's assets. There is room in this race, moreover, for the granting of security interests—what any lien provides the lien holder vis-à-vis other creditors. Any given damage claimant stood at risk that Sulzer might convey a security interest in some or all of its assets to other persons—whether business creditors or, conceivably, particular persons with damage claims against the corporation.¹⁰³ But even such a creation of security interests in corporate assets would have assumed a race-like quality. Article 9 of the Uniform Commercial Code provides that the first perfected security interest in a given asset shall have priority over the second, and so forth.¹⁰⁴ First in time, first in right.

In theory, absent the class action, Sulzer might have granted security interests in its assets to would-be damage claimants on an individual basis, generating an elaborate priority scheme based upon their relative order of perfection under Article 9.¹⁰⁵ But the one kind of creditor to whom damage claimants did not stand to lose the race for Sulzer's assets is the creditor literally brought into being by the original class settlement:¹⁰⁶ namely, the trust fund as the recipient of the security interest conveyed by the lien.

The original class settlement would have altered the rules of the race by effectively providing class members *as a class* with a security interest in the assets of Sulzer. The effect of the lien—indeed, its *only* effect, given the loophole for sales of corporate assets for other "business purposes"—would have been to prevent

¹⁰³ See Sulzer Settlement Agreement (cited in note 96) (discussing effect of lien); UCC § 9-322(a) (Foundation 2002) (discussing priority of conflicting security interests).

¹⁰⁴ UCC § 9-322(a)(1).

¹⁰⁵ *Id.*

¹⁰⁶ Sulzer Class Action Settlement Agreement (cited in note 96).

opt-out claimants from doing what they remained perfectly entitled to do before the class settlement: specifically, to try to leapfrog ahead of other would-be damage claimants for ultimate payment from the Sulzer assets. And the way that the class settlement would have effected this restructuring of damage claimants' rights was to bring into being a legal entity, the trust fund, in the same way that the class settlement designers in *Ortiz* purported to bring into being a limited fund: namely, by the mere say-so of the class settlement agreement, not by reference to anything antecedent to the class itself. In this manner, the original class settlement attempted in the Sulzer hip implant litigation suffered from the same fatal circularity in its justification as the faux limited fund in *Ortiz*.¹⁰⁷

In fact, the original Sulzer deal is exactly what one would predict would be attempted in the aftermath of *Ortiz*. In structural terms, the original Sulzer class settlement sought to deter opt-outs not merely by positing an attractive alternative avenue for payment (as in the Agent Orange class settlement), but also by altering the preexisting rights of hip implant patients (in a manner analogous to the liability cap imposed by Congress in the 9/11 Fund legislation).¹⁰⁸ Had the original class settlement succeeded in its ambition to deter opt-outs, the practical effect would have been to cap the liability of Sulzer at the pot of cash it obligated to the trust fund—a sizeable sum that nonetheless fell glaringly short of Sulzer's net worth. As such, the original deal would have enabled class counsel and their defense counterparts to obtain, in practical effect, the closure of a mandatory class settlement without having to satisfy the demand of *Ortiz* for proof of a true limited fund set at the "maximum"¹⁰⁹ that Sulzer could pay.¹¹⁰ The twenty million dollars "success fee" that would then have been due to Scruggs would have been a mere pittance to pay for such all-encompassing closure in the hip implant litigation.

For reasons that I explore in greater depth in a companion article,¹¹¹ the district court largely missed the effect that the original class settlement would have had upon the preexisting rights

¹⁰⁷ Compare Sulzer Class Action Settlement Agreement (cited in note 96) with *Ortiz*, 527 US at 848.

¹⁰⁸ Sulzer Class Action Settlement Agreement (cited in note 96).

¹⁰⁹ *Ortiz*, 527 US at 838–39 (pointing out that the most distinctive characteristic of a Rule 23(b)(1)(B) case is that the maximum total of aggregated liquidated damages is greater than the maximum total funds available to satisfy them).

¹¹⁰ Bravin, *Sulzer Medica*, Wall St J at A3 (cited in note 89).

¹¹¹ See Nagareda, 103 Colum L Rev at 213–216 (cited in note 21).

of hip implant patients and, for that matter, the subtlety of the settlement designers' effort to evade *Ortiz*. The changes made to the deal under the threat of reversal on appeal nonetheless help to frame the consequences of an insistence upon the right to opt out as a vehicle to preserve preexisting rights. The major change consists of more cash for the class in the form of boosts in the payout amounts provided by the class settlement, particularly for high-value claimants.¹¹² This comes as little surprise. Absent the ability to deter opt-outs by detrimentally altering their preexisting rights in ordinary civil litigation, the designers of a class settlement can deter only by enhancing the relative attractiveness of the alternative bundle of rights that they hold out for the class—here, the sums from which the objecting law firms stood to take their contingency fees for the representation of high-value claims under the class settlement. For its part, the district court blessed the final version of the deal,¹¹³ and the period for the filing of an appeal has since run.

D. Institutional Lessons

Within the foregoing comparison of class settlement arrangements lurks a deeper institutional point: namely, that the authority to alter legal rights through the vehicle of a class settlement must stop short of the Article I authority that Congress might choose to wield to alter rights by way of legislation. Outside the special scenario of a limited fund as delineated in *Ortiz*, the class action device has no authority to alter the preexisting rights of class members in the manner of duly enacted legislation. An opt-out class settlement crosses this line. It becomes an offer that class members cannot refuse in the sinister sense of *The Godfather* when it seeks to do what Congress itself has done in the 9/11 Fund legislation: to induce people to relinquish their preexisting rights to sue not simply by positing an attractive alternative avenue for redress but also by altering those rights themselves.

The basis for a distinction between class actions and legislation ultimately rests upon an underlying conception of legitimate

¹¹² *In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation*, No 1:01-CV-9000, slip op at 3 (N D Ohio Mar 14, 2002) (table comparing original and final class settlements), available online at <http://www.hipimplantlaw.com/pdf/20020314_memo_and_order.pdf> (visited Mar 22, 2003).

¹¹³ *Id.*

lawmaking processes.¹¹⁴ The emergence of the class action as a transactional device for the sale of class members' rights to sue accentuates the tension between class actions and conventional lawmaking institutions, for the substitution of rights posited by a class settlement amounts to a kind of mini-legislation. Yet, that substitution takes place at the behest not of politically accountable representatives but, rather, class counsel as the self-appointed bargaining agents for the class.

To be sure, a court must approve a class settlement under Rule 23(e) for it to have preclusive effect.¹¹⁵ But, as both commentators and judges themselves have long recognized, courts operate at a distinct informational disadvantage in the class settlement review process by comparison to the attorneys who seek judicial blessings for their deals.¹¹⁶ Even the most conscientious of courts, moreover, must undertake class settlement review against the sirens' call to sign off on the deal as a means of docket clearance.¹¹⁷ As a result, the presence of judicial review in the class settlement process serves, at best, as a highly imperfect source of regulation.

The right to opt out, by contrast, posits a different kind of check upon the deal-making power of class counsel, one whereby damage claimants with claims marketable on an individual basis can obtain an alternative bargaining agent whose self-interest is not tied to the representation of the class claims on a collective basis.¹¹⁸ In the Sulzer hip implant litigation, this check proved especially powerful, because many of the persons with the most marketable claims—implant recipients in need of revision sur-

¹¹⁴ See generally Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 198–206 (Yale 1987) (comparing legislation and group litigation).

¹¹⁵ See Klonoff and Bilich, *Class Actions* at 583 (cited in note 5) (discussing procedure surrounding class action settlements).

¹¹⁶ Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va L Rev 1051, 1105 (1996) (arguing that judges learn of settlement flaws from objectors in adversarial fairness hearings); *Kamilewicz v Bank of Boston Corp.*, 100 F3d 1348, 1352 (7th Cir 1996) (Easterbrook dissenting from denial of rehearing en banc) (warning of danger of representative plaintiffs and their lawyers putting on a "staged performance" in fairness hearings).

¹¹⁷ Samuel Issacharoff, *Class Action Conflicts*, 30 UC Davis L Rev 805, 829 (1997).

¹¹⁸ In their capacity to review class settlements for fairness under Rule 23(e) and to make fee awards to class counsel for the class representation, courts act as regulatory bodies along the lines of public utility commissions. The right to opt out, by contrast, injects a market-based check upon the deal-making power wielded by class counsel over the rights of class members. For further development of this argument by reference to the economic literature on monopoly regulation, see Nagareda, 103 Colum L Rev at 163–175 (cited in note 21).

gery—*already had* counsel eager to litigate their cases on an individual basis.¹¹⁹

Once one sees the class action as it actually operates—as a rival institution for law reform rather than a framework for trial¹²⁰—the deals effectuated by class settlements come to implicate competing notions of legal representation. In private law, contracts stand as the vehicles for transactions involving the sale of legal rights. Only the owner of a right, or an agent to whom the owner has delegated bargaining power, can sell that right. Seen in this light, the original Sulzer class settlement was particularly suspect, for it effectively would have replaced the sales agents with whom large numbers of revision surgery patients had *actually* contracted for representation with a far less reliable sales agent, class counsel, whose bargaining authority stemmed, at best, only from an implied delegation of power under Rule 23.¹²¹

Implied delegations are not foreign to the law, of course. In public law—the world of government—alterations of preexisting rights are contractual only in the attenuated sense of consent by the populace as a whole to a scheme of political representation.¹²² In the public realm, the legitimacy of representation stems not so much from a contract as from features of the political process itself—principally, the opportunity to remove elected representatives from power at some later time.¹²³ Drawing upon concepts of representation in political theory, Stephen Yeazell has observed that the modern class action operates in a shadowy, gray area between the contractual notions of representation familiar to private law and ideals of political representation in public law.¹²⁴ The right to opt out effectively enables high-value damage claimants to insist upon the contractual sort of representation familiar in private law.

¹¹⁹ See Petitioners' Consolidated Brief in Support of Appeal Pursuant to FRCP 23(f) and FRAP 5, at 3–4, *In re Inter-Op Hip Prosthesis Product Liability Litigation*, Nos 01-303 and 01-304 (6th Cir 2001) (cited in note 98).

¹²⁰ Rubenstein, 89 *Georgetown L J* 371 (cited in note 8).

¹²¹ See Nagareda, 103 *Colum L Rev* at 189–199 (cited in note 21) (discussing Rule 23 as an implied delegation of bargaining power).

¹²² In textual terms, congressional lawmaking power under Article I stems from a delegation of power from “the People” collectively. US Const Art I, § 2, cl 1. For an insightful argument linking the legitimacy of the Constitution as a whole to notions of consent to a process for lawmaking that accords protection to individual rights, see Randy E. Barnett, *Constitutional Legitimacy*, 103 *Colum L Rev* 111 (2003).

¹²³ Yeazell, *From Medieval Group Litigation* at 199–200 (cited in note 114).

¹²⁴ *Id* at 198–206.

Why should that be so? The reason stems from an abiding sense that class counsel are neither fish nor fowl—neither the contractual agents of class members nor their political representatives. If anything, the problem is not that the deal-making power of class counsel is too sweeping but, rather, that it is too narrow. The sale of rights by way of a class settlement is literally a one-shot deal. It is not part of an ongoing series of policy decisions amenable to logrolling in the manner of the legislative process. As such, the deal struck by any given class settlement must be justified, if at all, only by reference to what is bought and sold in that transaction.¹²⁵ The right to opt out operates to ensure that there is genuine exchange—real buying and selling—rather than unilateral appropriation of class members' preexisting rights in whole or in part.

Unilateral appropriation was the essence of both the class settlement properly struck down in *Ortiz* and the deal originally attempted in the Sulzer hip implant litigation.¹²⁶ Both would have taken away a portion of claimants' preexisting rights *even if* they opted out of the class: in *Ortiz*, the right to levy against the net worth of Fibreboard beyond its insurance coverage, and in the hip implant litigation, the prospect of leapfrogging other individual damage claimants to obtain payment from the assets of Sulzer. If anything, one can understand the dollar boosts ultimately made in the Sulzer class settlement as reflecting—albeit, in a rough, back-of-the-envelope manner—the purchase price for class members' right to leapfrog. The point, however, lies not so much in the specific calculation of that price but, rather, in the underlying premise that a price must be paid—that would-be class members' rights really must be purchased, not appropriated.

The proposition that the defendant must pay to purchase damage claimants' preexisting rights nonetheless leads to a further question concerning efforts to deter opt-outs: namely, why pay the actual holders of rights to sue in the form of generous payouts under the class settlement? Why not, instead, pay some lesser sum to class counsel's rivals within the plaintiffs' bar in exchange for their agreement not to represent opt-out claimants in the future? The goal, in short, would be to do figuratively to the plaintiffs' law firms best positioned to represent opt-out claimants what Michael Corleone did literally to the heads of the

¹²⁵ Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev 43, 46 (1989).

¹²⁶ *Ortiz*, 521 US at 828; Sulzer Class Action Settlement Agreement (cited in note 96).

“five families” in *The Godfather*: to eliminate in one fell swoop the threat that such rivals pose to the security of one’s position, whether as counsel for the plaintiff class or as the dominant organized crime family in New York. The next Part confronts the challenge that this technique for closure would pose for the integrity of the class action.

III. CLOSURE THROUGH ANTICOMPETITIVE AGREEMENTS

The idea of paying off the plaintiffs’ law firms best positioned to represent opt-out claimants to refrain from doing so is, I dare say, what one should expect to emerge as the next step in the search for closure in opt-out class settlements. Close examination of the Sulzer hip implant settlement virtually invites efforts along these lines, for it unwittingly exposes the existence of an increment of money thought necessary to deter opt-outs.¹²⁷ The next logical question for class settlement designers is how to reduce that increment in magnitude by paying it to someone other than the class.

In the Sulzer hip implant litigation, the interests of high-value claimants and those of the objecting law firms representing them were closely aligned. Both would escape the lien and trust fund of the original class settlement, or neither would. That alignment of interests, however, arose from the happenstance that prominent plaintiffs’ law firms other than class counsel had managed to recruit as their individual clients many of the most lucrative claims that class counsel wanted to rope into the class.¹²⁸ The ingenuity of what one might dub the “Michael Corleone solution” to the problem of closure is that it would drive a financial wedge between the would-be class members most in need of an alternate bargaining agent and the law firms best positioned to serve in that role.

In fact, the ingenuity of the Michael Corleone solution runs even deeper, for it manages to avoid altering the preexisting legal rights of would-be opt-out claimants. If they opt out, then they retain the same rights that they had prior to the class settlement. They would be entitled to sue the defendant for damages and, if

¹²⁷ See Bravin, *Sulzer Medica*, Wall St J at A1 (cited in note 89) (noting that the settlement tied up the company’s assets in compensation for the class, thus hurting more seriously injured plaintiffs who stood to opt out and win large damage awards).

¹²⁸ See Petitioners’ Consolidated Brief in Support of Appeal Pursuant to FRCP 23(f) and FRAP 5, at 3–4, *In re Inter-Op Hip Prosthesis Product Liability Litigation*, 01-303 and 01-304 (6th Cir 2001) (cited in note 98).

successful, to levy against the defendant's net worth, as necessary to satisfy any judgment. They simply would have a hard time finding a lawyer to help enforce their rights. Any plaintiffs' law firm taking on such a representation would have to incur substantial costs to enter the litigation, as its lawyers would have to familiarize themselves with the underlying factual and legal issues from scratch. But in a civil justice system in which legal representation remains allocated by the market, no aspiring plaintiff for damages can credibly claim a legal entitlement to representation, much less to be represented by any particular firm within the plaintiffs' bar.

A strategy of paying off the would-be representatives of opt-out claimants builds upon settlements of non-class lawsuits in the civil justice system. Though they have garnered relatively little attention, agreements on the part of plaintiffs' counsel not to represent similar persons in the future have formed a recurring feature of non-class settlements in recent years.¹²⁹ In some instances, these agreements have taken a subtle form, whereby the settling defendant retains plaintiffs' counsel as a consultant in order to create an ethical conflict of interest that would prevent counsel from representing future persons in litigation against the defendant.¹³⁰ The reason for such agreements is not hard to discern. In any situation in which an initial plaintiff's lawsuit concerns matters that are not idiosyncratic to that particular plaintiff—say, the safety of a widely-sold consumer product—the defendant will fear that the payment of a settlement to that initial plaintiff simply will invite similar lawsuits in the future. Agreements not to represent similar plaintiffs thus are in keeping with other controversial features of non-class civil set-

¹²⁹ Geyelin, *Some Companies Pay*, Wall St J at B1 (cited in note 30). To put the point mildly, the law of professional responsibility raises serious questions about the permissibility of such agreements as an ethical matter. See, for example, Model Rules of Professional Conduct, Rule 5.6(b) (Foundation 2000) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."); Model Code of Professional Responsibility, DR 2-108(B) (Foundation 2000) ("In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law."); Restatement (Third) of the Law Governing Lawyers § 13(2) (ALI 2000) ("In settling a client claim, a lawyer may not offer or enter into an agreement that restricts the right of the lawyer to practice law, including the right to represent or take particular action on behalf of other clients."); ABA Committee on Ethics and Professional Responsibility, Formal Op 93-371 (Apr 16, 1993) ("[A] lawyer may not offer, nor may opposing counsel accept, a settlement agreement which would obligate the latter to limit the representation of future claimants.").

¹³⁰ Geyelin, *Some Companies Pay*, Wall St J at B1 (cited in note 30).

tlements—such as agreements to seal the court records in the initial case¹³¹—designed to prevent a first lawsuit from turning into thousands.

Extension of agreements not to sue to the class settlement context would give rise to additional complexity. The plaintiffs' law firms about which the defendant must worry consist not of class counsel—with whom the defendant already will have struck a deal in the class settlement—but, rather, of other law firms with involvement in the litigation prior to the class settlement, such as would be positioned to represent opt-out claimants with only minimal additional costs. The identification of those firms is unlikely to prove difficult, however. In fact, an institutional feature of complex civil litigation unwittingly might assist in that enterprise.

Class settlements often take place in the aftermath of the consolidation by the Judicial Panel on Multidistrict Litigation ("MDL Panel") of related lawsuits pending in the federal courts.¹³² The choice of the federal district court in which to consolidate pre-trial proceedings can be highly contentious, with the debate over that question serving as a surrogate for an underlying dispute within the plaintiffs' bar over which firm (or consortium of firms) will assume leadership of the consolidated litigation.¹³³ The lead law firm on the plaintiffs' side tends to emerge as the natural negotiating partner for a defendant interested in putting the entire litigation behind it by entering into a class settlement.¹³⁴ At that point, the defendant and class counsel interested in implementing the Michael Corleone solution need only refer back to the proceedings before the MDL Panel to generate a roster of the potential rival firms to be paid off.

Though undeniably tempting as a strategic matter for the dealmakers behind a class settlement, the Michael Corleone solu-

¹³¹ A small number of federal and state courts presumptively prohibit the sealing of court records as part of a civil settlement. See Eric Frazier, *Judges Veto Sealed Deals*, Nat'l L J A1, A10 (Aug 12, 2002). For an argument in favor of allowing the settling parties to opt for secrecy, see Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv L Rev 427, 491–94 (1991).

¹³² The consolidation power of the MDL Panel flows from 28 USC § 1407(a) (1994).

¹³³ For illustrative MDL Panel proceedings, see *In re Silicone Gel Breast Implants Products Liability Litigation*, 793 F Supp 1098, 1100–01 (JPML 1992) (characterizing the contending law firms' arguments over the choice of district court as "fueled by an acrimonious dispute among counsel, relating to control of the litigation"); *In re Asbestos Product Liability Litigation*, 771 F Supp 415, 420 (JPML 1992) (noting that the dispute over transfer stemmed from "differing (and often inconsistent) visions" of the litigation).

¹³⁴ Rubenstein, 89 Georgetown L J at 420 (cited in note 8).

tion nonetheless should not rise to legitimacy in the eyes of the law governing class actions any more than it should, in its bloodier form, in the eyes of the law applicable to organized crime. In economic terms, the Michael Corleone solution effectively transfers wealth to class counsel's competitors within the plaintiffs' bar from the actual holders of rights to sue whose compensation the class settlement otherwise would have to boost in order to induce them to remain in the class. If allowed to take place, such a transfer would turn the conventional justification for a damage class action on its head. It would convert the class action from a procedural device to bundle together related damage claims and thereby to enable claimants to capture the gains to be had from resolution of the litigation as a whole into a vehicle largely for rent extraction by the plaintiffs' bar. The hard question about the Michael Corleone solution is not whether it should be permitted but, rather, what is the appropriate institutional vehicle to enforce a prohibition.

One relatively straightforward part of any solution—but only a part—would be for reviewing courts under Rule 23(e) to adopt a per se rule that the existence of side agreements to pay off the would-be representatives of opt-out claimants should doom judicial approval of a class settlement. The point is not that class settlement designers somehow must look out for the well-being of opt-out claimants; rather, side agreements to implement the Michael Corleone solution stand as compelling evidence that the terms of the settlement *for the class members* are not “fair, reasonable, and adequate.”¹³⁵

Consideration of any such side agreements would mark only a modest step from the inquiry that the Supreme Court in *Amchem* and *Ortiz* already has prescribed for the class settlement review process.¹³⁶ In both cases, the Court pointed with trepidation to the existence of side agreements by which the settling defendants resolved the pending asbestos cases represented by class counsel in the tort system on terms different from those applicable to the *Amchem* and *Ortiz* classes of future asbestos claimants.¹³⁷ Whether that trepidation was justified in the particular

¹³⁵ Manual for Complex Litigation (Third) § 30, 42 at 28 (cited in note 75).

¹³⁶ See *Amchem*, 521 US at 620 (emphasizing that the protection of absent plaintiffs demands courts' heightened attention in settlement-only certifications); *Ortiz*, 527 US at 838–47 (detailing the required characteristics of a class needed to justify a 23(b)(1)(B) class certification).

¹³⁷ *Amchem*, 521 US at 601; *Ortiz*, 527 US at 852.

contexts of *Amchem* and *Ortiz* is a matter of some dispute, as I suggested earlier.¹³⁸ For present purposes, the point is simply that *Amchem* and *Ortiz* already recognize the importance of scrutinizing side agreements to the class settlement. A proposed amendment to Rule 23(e) would write this notion into the text of the class action rule itself.¹³⁹

Nonetheless, judicial review is only a partial solution at best. The class action literature in recent years documents wide variations in the scrutiny accorded to class settlements by reviewing courts, particularly those in a small number of state courts in localities notorious as magnets for class settlements.¹⁴⁰ Anomalous lax courts aside, a per se rule against the approval of a class settlement struck in tandem with the Michael Corleone solution for rival plaintiffs' law firms would have the predictable effect of driving that solution underground. The game would consist of crafting agreements to afford the settlement designers what one might describe as plausible deniability in the class settlement review process under Rule 23(e), but nonetheless to forestall the prospect of opt-outs actually obtaining representation by firms knowledgeable about the litigation.

There is an additional enforcement vehicle, however, that, appropriately enough, also bears a resemblance to events depicted in *The Godfather*.¹⁴¹ Michael Corleone's systematic elimination of rivals within the world of organized crime does not, in fact, bring him closure. The death of one rival murdered in an especially grisly form on Michael's orders—casino owner Moe Greene, famously shot through the eye in *The Godfather*¹⁴²—supplies the

¹³⁸ See text accompanying note 64.

¹³⁹ Proposed Rule 23(e)(2) would provide that "[t]he parties seeking approval of a [class] settlement . . . must file a statement identifying any agreement made in connection with the proposed settlement." Report of the Civil Rules Advisory Committee at 102 (May 20, 2002), available online at <<http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf>> (visited Mar 22, 2003).

¹⁴⁰ See John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 Harv J L & Pub Pol 143, 157–61 (2001) (Manhattan Institute study showing disproportionate rates of class action filings in certain state courts); John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, Civil Justice Rep No 5, Center for Legal Policy at the Manhattan Institute (July 2002) (subsequent study focusing on Madison County, Illinois) (available online at <http://www.manhattan-institute.org/html/cjr_5.htm> (visited Mar 6, 2003); Adam Liptak, *Court Has Dubious Record as Class Action Leader*, NY Times A14 (Aug 15, 2002) (discussing abusive class settlements approved by state judges in Madison County).

¹⁴¹ Paramount 1972.

¹⁴² *Id.*

impetus for plot developments in *The Godfather Part II*.¹⁴³ In that sequel, Michael Corleone tangles with yet another rival in the criminal underworld: Hyman Roth, who ultimately is revealed as the mastermind behind a plot to murder Michael in order to gain control of organized crime activities in pre-Castro Cuba and, as a fringe benefit, to avenge the earlier murder of Roth's friend Moe Greene on Michael's order.¹⁴⁴

The larger point is one that should not be lost on the law of class settlements: judicial review aside, an additional way to enforce a stricture against the Michael Corleone solution is to turn that technique against itself. The analogue in the class action context would consist of a sequel: namely, a second class action on behalf of the members of the original class whose benefits under the settlement were reduced to fund the implementation of the Michael Corleone solution. In the academic literature, Susan Koniak and George Cohen have advanced a proposal along these lines—albeit, without reference to agreements that seek to minimize opt-outs by securing the docility of the law firms best positioned to represent opt-out claimants.¹⁴⁵ Koniak and Cohen call for lawsuits against class counsel under the federal antitrust laws in the event that their deal-making binds class members to an inadequate class settlement.¹⁴⁶

The full implications of the Koniak-Cohen proposal with regard to class settlements as a whole are beyond the scope of this Article. Koniak and Cohen understandably devote the bulk of their discussion to whether doctrines of antitrust immunity would shield class counsel from liability based upon the approval of a class settlement by a governmental institution (the reviewing court).¹⁴⁷ I advance a more specific point here: the invocation of antitrust strictures is especially apt with respect to the Michael Corleone solution, for it amounts, at bottom, to a series of side deals that do not comprise part of the class settlement agreement on which a reviewing court passes judgment under Rule 23(e). As such, there would be scant basis for application of antitrust immunity doctrines predicated upon some form of governmental imprimatur.

¹⁴³ Paramount 1974.

¹⁴⁴ *Id.*

¹⁴⁵ Koniak and Cohen, 82 Va L Rev at 1051 (cited in note 116).

¹⁴⁶ *Id.* at 1181.

¹⁴⁷ *Id.* at 1183–1214.

Questions of immunity aside, the law of antitrust has long differentiated its treatment of vertical and horizontal non-competition agreements.¹⁴⁸ Vertical agreements run between firms at different rungs of the distribution chain—say, between product manufacturers and retail sellers—whereas horizontal agreements run between firms competing at the same rung.¹⁴⁹ Antitrust law subjects vertical agreements not to compete to the rule of reason, comparing their anticompetitive effects against their justifications of efficiency; but antitrust law condemns *per se* horizontal agreements not to compete.¹⁵⁰

Though the matter is not entirely free from doubt, a court properly would characterize the implementation of the Michael Corleone solution for opt-outs as a horizontal agreement not to compete—specifically, an agreement on the part of rival plaintiffs' law firms not to undercut the monopoly over the representation of class members that class counsel otherwise would have. To be sure, the rival plaintiffs' law firms might receive payment for their agreement not to compete from the settling defendant rather than from class counsel. That the payoffs pursuant to the agreement might flow from a firm not part of the plaintiffs' bar, however, would not prevent a court from characterizing the arrangement as a horizontal agreement, at least as long as the assent of each rival is effectively contingent upon all rivals agreeing not to compete with class counsel.¹⁵¹

¹⁴⁸ See *United States v Topco Associate, Inc.*, 405 US 596, 608 (1972) (defining horizontal and vertical restraints).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 607–08. Antitrust law does recognize some latitude for horizontal agreements in industries in which such agreements “are essential if the product is to be available at all.” *NCAA v Board of Regents of the University of Oklahoma*, 468 US 85, 101 (1984) (applying the rule of reason to restrictive agreements as part of an intercollegiate association to facilitate athletic competition). The express recognition of the right to opt out in Rule 23 and the constitutional status of that right per *Shutts* would foreclose class settlement designers from successfully arguing that the Michael Corleone solution for opt-outs is somehow essential in order for Rule 23(b)(3) class settlements to exist at all.

¹⁵¹ The Seventh Circuit characterized as a horizontal agreement an arrangement by which toy retailer Toys ‘R’ Us entered into certain restrictive agreements with toy manufacturers concerning the distribution of their products. *Toys ‘R’ Us, Inc v Federal Trade Commission*, 221 F3d 928, 934–36 (7th Cir 2000) (panel op by Wood). Although the payments underlying those agreements flowed vertically (from the retailer to the various manufacturers), the court had no difficulty concluding that the arrangement nonetheless must be condemned *per se*, given substantial evidence that the assent of each manufacturer to the distribution restrictions was contingent upon the assent of all rival manufacturers. *Id.* at 936. Similarly, it would do no good for the class settlement designers to secure agreements not to represent opt-out claimants only from some, but not all, realistic rivals to class counsel within the plaintiffs' bar. For their part, those rivals would be

As a matter of settled doctrine, moreover, antitrust law has long condemned per se horizontal agreements not just between actual competitors but also between an incumbent firm and potential competitors. As the leading antitrust treatise observes:

[T]he law does not condone the purchase of protection from uncertain competition any more than it condones the elimination of actual competition. Thus the general rule is that naked horizontal market division agreements are unlawful per se, whether or not the firms were actual competitors in divided market segments before the agreement was entered.¹⁵²

Whether with actual competitors or potential competitors, horizontal agreements not to compete are condemned per se for much the same reason that class action law should condemn the Michael Corleone solution to the problem of opt-outs: both effectively transfer wealth from consumers (here, class members as the consumers of class counsel's legal services) to would-be competitors. In particular, antitrust law seeks to guard against precisely the sorts of agreements of the implicit, wink-and-nod variety likely to arise as ways to evade judicial review under Rule 23(e). Agreements to implement the Michael Corleone solution, like agreements among rival firms not to compete in the world of business, are unlikely to be spelled out on paper.

CONCLUSION

The unanticipated outgrowth of the Supreme Court's landmark class settlement decisions in *Amchem* and *Ortiz* has been to invite efforts to craft ostensible opt-out settlements that deter the exercise of the right to opt out.¹⁵³ Courts nonetheless may draw a principled line between permissible and impermissible deterrent devices by reference to what one might call the "preexistence principle": the proposition that the class action, unlike legislation,

unlikely to embrace restrictions on their ability to represent opt-out claimants without assurance that all other rivals would be under the same restriction.

¹⁵² Herbert Hovenkamp, 12 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2030b at 175 (1999). See id ¶ 2030c at 177 (clarifying that "[a]lthough the word 'division' may not always capture the nature of the agreement . . . , the important element is that the agreements at issue are arrangements among competitors that give one firm the right to restrict the way that a rival expands or innovates").

¹⁵³ See Part I B.

enjoys no general mandate to alter preexisting rights.¹⁵⁴ Opt-out class settlements cross the line from legitimate offers too good to refuse into illegitimate coercion when they would alter the rights even of those who choose to stand apart from the class.

The further step to which the foregoing approach points, however, is for class settlement designers to leave the preexisting rights of opt-out claimants undisturbed but to undertake measures to ensure that such claimants will be unable to find a lawyer versed in the underlying litigation to take their case on an individual basis. Such measures amount to agreements on the part of rival firms within the plaintiffs' bar not to compete with class counsel. The law should recognize these agreements as such by subjecting class counsel and their defense counterparts to anti-trust liability to recoup the resulting welfare loss to class members.

One nevertheless should not conclude that the vanquishing of what one might dub the Michael Corleone solution for opt-outs somehow would mark the beginning of a golden era in the law of class settlements. A more realistic view would hold that class settlement designers will continue to develop increasingly sophisticated measures to achieve closure while appropriating for themselves or their cohorts as much as they can of the gains from settlement that class members themselves otherwise might enjoy. The law of class actions must maintain a steady vigilance toward those innovations. Michael Corleone, after all, lives to tell of his dealings with Hyman Roth, not vice versa.¹⁵⁵

¹⁵⁴ See Part II D

¹⁵⁵ *The Godfather* Part II (Paramount 1974).

